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NO. 96-1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARLAND DENTY,
PETITIONER,

V.

SMITHKLINE BEECHAM CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. THE GRANT OF THIS PETITION FOR CERTIORARI WILL NOT REQUIRE THIS COURT TO MAKE ANY FACTUAL DETERMINATIONS.

Procedurally, if certiorari is granted, this case will involve review of an interlocutory order entering partial summary judgment in favor of the defendant/respondent. No factual determinations will have to be made, complex or otherwise, because there was ample evidence on the record to take to the jury the issue of whether SB plc and SB Corp were a single employer, and therefore that the employment decision to be reviewed could be looked at as a denial of promotion rather than a failure to hire. Indeed, the question certified for review - by stipulation of the parties with the approval of the District Court[1] and thereafter the Court of Appeals - states the relevant factual assumptions on which both lower courts based their determination:

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[1] See, Order of May 10, 1996 Granting Plaintiff's Motion for Certification, Pet. App. at 21

> Are the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act applicable to the **denial of a promotional opportunity** based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a **United States subsidiary controlled by a foreign parent** corporation not itself controlled by an American corporation, **where the promotional opportunity is a position with the foreign corporation outside the United States?**

Thus, Respondent is simply incorrect in stating that the Petitioner asks the Court to pierce a corporate veil or to make any other factual determinations. Petitioner is not asking this Court to determine whether he can prove the facts necessary to prevail at trial, but rather seeks review of the lower Courts' holding that he can not prevail as a matter of law, even if the jury finds the facts in his favor. It is Respondent who now improperly attempts to raise factual issues by arguing that the opportunity at issue was a "hiring" rather than a "promotion." This appears most obviously on the very first page of Respondent's Brief in Opposition, where it has ignored the stipulated and court-approved issue certified for appeal, and has

instead impermissibly restated the Question Presented for Review more to its liking.

II. EACH OF THE ARGUMENTS STATED IN THE PETITION WAS FULLY BRIEFED BEFORE THE LOWER COURTS.

Respondent's claim that the Petition is based on arguments not raised below is grounded on *Respondent's assertion* that Petitioner is asking the Court to pierce a corporate veil, which is in turn based upon *Respondent's* desire to re-characterize the factual premise on which both lower courts based their determination from the denial of a promotion to a refusal to hire. To the extent that there are factual disputes which may affect the outcome of a trial of Petitioner's claims, they are appropriately reserved for trial. Here, where the factual assumptions on which the lower courts based their decisions are clear, Petitioner properly asks this Court to determine whether the rule of law announced by the lower courts - which denies the protection of American laws prohibiting discrimination in the terms and conditions of employment of an individual employed

within the territorial United States - is correct.

Quite simply, every one of the points raised in the Petition was properly raised below.

III. PETITIONER DOES NOT SEEK TO APPLY UNITED STATES LAW ABROAD; HE SEEKS THE PROTECTION OF UNITED STATES LAW GUARANTEEING EQUALITY IN THE TERMS, CONDITIONS AND PRIVILEGES OF HIS EMPLOYMENT IN THE UNITED STATES

The issue raised in this Petition is not whether the ADEA's extraterritorial reach encompasses the foreign acts of a foreign employer, as Respondent states. Rather, the issue is whether there is any basis in the ADEA on which to deny its protection to an individual employed in the United States

Respondent argues that a foreign employer may discriminate in the terms, conditions and privileges of Petitioner's employment because the decision in issue - promotion to an overseas post - would place the employee beyond the reach of United States law. In making this argument, Respondent asserts that the courts below were

correct in concluding that the ADEA does not distinguish between failure to hire and failure to promoted situations. Both of these arguments were explicitly rejected by this Court in *Hishon v. King & Spaulding*, 467 U. S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). This Court stated that the right to fair consideration for promotion to partnership was a privilege of plaintiff's *present* status as an employee, and that in her *current* status as an employee she was entitled to equal employment opportunity.

Respondent also argues that the 1984 Amendments to the ADEA should now be interpreted by this Court as a limitation upon the reach of that statute. The 1984 amendments were enacted to expand, not contract, the scope of the ADEA by assuring that American citizens employed overseas by American employers, or by foreign entities controlled by American employers, would not be any less protected than if they worked in the United States. Respondent's argument would turn those amendments on their head. Congress intended

to strengthen protections afforded to our citizens employed overseas; it did nothing to undermine the protections already afforded to those employed within the United States

IV. CONCLUSION

Any resolution of the issues presented in this Petition for Writ of Certiorari will inevitably ripple across our borders - either by telling foreign employers that the decision whether to promote one of their United States employees to an overseas post is immune from scrutiny under the ADEA, or placing foreign decision-makers on notice that opportunities for United States based employees must be offered in accordance with American laws barring discrimination in the workplace. This is not meddling in foreign affairs. It is nothing more than the application of United States law to those employed in the United States

Therefore, for the reasons stated here and in Petitioner's

Petition for a Writ of Certiorari, Petitioner requests that his Petition be granted.

Respectfully submitted,

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